IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 292

CARRIE BUCK, BY ETC., PLAINTIFF IN ERROR.

v.

DR. J. H. BELL,
SUPERINTENDENT OF STATE COLONY FOR EPILEPTICS AND FEEBLE-MINDED,

DEFENDANT IN ERROR.

FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR.

The Constitutionality of the Virginia Act for the Sterilization of Hereditary Defectives.

The Limits of the Power of the State over the Welfare of the Unfit and over the Propagation of their Kind.

J. P. BELL COMPANY, INC., PRINTERS, LYNCHBURG, VIRGINIA

Subject Index

TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 292

CARRIE BUCK, BY ETC., PLAINTIFF IN ERROR.

v.

DR. J. H. BELL,
SUPERINTENDENT OF STATE COLONY FOR EPILEPTICS AND FEEBLE-MINDED,

DEFENDANT IN ERROR.

FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR.

The Constitutionality of the Virginia Act for the Sterilization of Hereditary Defectives.

The Limits of the Power of the State over the Welfare of the Unfit and over the Propagation of their Kind.

STATEMENT.

This writ of error brings under review a judgment of the Supreme Court of Appeals of Virginia sustaining the constitutionality of the Virginia Sterilization Statute and affirming an order of the Circuit Court of Amherst County, Virginia,

which approved an order of the Special Board of Directors of the State Colony for Epileptics and Feeble-Minded requiring the sexual sterilization, by the operation of salpingectomy, of Carrie Buck, an eighteen-year-old feeble-minded patient of that Colony, pursuant to the provisions of an Act of the General Assembly of Virginia to provide for the sexual sterilization of inmates of State Institutions in certain cases, approved March 20, 1924, Acts of Assembly, Virginia, 1924, p. 569; Michie's Code, Secs., 1095h-1095m.

This Act is printed *in extenso* as an Appendix to the Brief filed here for the Plaintiff in Error.

The opinion of the Supreme Court of Appeals of Virginia, rendered November 12, 1925, appears at pages 98 to 108 of the Record and in Virginia Reports, Vol. 143, page 310; 130 S. E. Rep. 516.

The judgment under review entered the same day appears on pages 108 and 109 of the record.

The errors assigned challenge the constitutionality of the said act as being repugnant to the Constitution of the United States in providing, as is alleged, for the deprivation of liberty without due process of law, imposing a cruel and unusual punishment and denying to those subject to the act the equal protection of the laws. (Rec., pp. 110-111.)

THE FACTS.

Commitment to the Colony.

Carrie Buck, then seventeen years of age, but of a mental age of only nine years, and the mother of an illegitimate child, was under an inquisition duly held in Albemarle County, Virginia, committed to the State Colony for Epileptics and Feeble-Minded on January 23, 1924. (Rec., pp. 12-23.)

Carrie's child was afterwards found to give evidences of defective mentality, while Carrie's mother, Emma Buck, of a

mental age of seven years, had previously been committed to the same Colony, as a feeble-minded person where with Carrie she remains in the custody of the State. Carrie's father is dead.

Previous to Carrie's commitment to the Colony she had for some years lived as a member of the household with a respectable family who had received her into their home when very young, taken good care of her in return for the simple services she might render despite her affliction and who would be glad to have her back again but for the risk they would have to run of her bearing other children. (Rec., p. 97.).

Sterilization Petition.

Dr. A. S. Priddy, an eminent physchiatrist and surgeon, Superintendent of the Colony, when Carrie was committed, after due observation confirmed the finding that she was a feeble-minded person, and after the passage of the sterilization statute being of opinion that Carrie was within its provisions and that both her welfare and the welfare of society would be promoted by her sterilization so that she might properly be returned to the liberty of the good home still open to her in Albemarle County instead of being kept in confinement for at least the more than twenty years that still remained of her child-bearing period of life, presented to the Special Board of Directors of the Colony a petition under the act, praying authority to perform or to have performed upon her the operation of salpingectomy. (Rec., pp. 8-10.)

Proceedings Before the Special Board of Directors.

In accordance with the requirements of the act notice of the application with a copy of the petition were duly served upon Carrie and upon her mother and upon Robert G. Shelton duly appointed by the Circuit Court of Amherst County as a suitable person to act as Carrie's guardian during and for the purposes

of the proceedings. (Rec., pp. 11-23-24-25-26-27-28.)

After such notice and a hearing in due course the said Special Board found that Carrie was feeble-minded and by the laws of heredity the probable potential parent of socially inadequate offspring likewise afflicted, that she might be sexually sterilized without detriment to her general health, that her welfare and the welfare of society would be promoted by such sterilization, and ordered that the operation of salpingectomy be performed upon her. (Rec., pp. 28-29.)

From this order her guardian and Carrie by her guardian as next friend, by a notice in writing stating the grounds of appeal, appealed, as allowed by the Act, to the Circuit Court of Amherst County. (Rec., pp. 1-8.)

The Proceedings in the Circuit Court.

In that court there was a full trial of the case, Carrie and her guardian appearing in person and being also represented by counsel.

The Evidence.

At the hearing of the appeal in the Circuit Court there was introduced in evidence the record of Carrie's commitment to the Colony, the record of the hearing upon the sterilization application before the Special Board of Directors of the Colony and the evidence of a number of witnesses by deposition and in person.

The Testimony of Witnesses.

Dr. H. H. Laughlin, of Long Island, New York, Assistant Director of the Eugenics Record Office of the Carnegie Institution of Washington, Expert Eugenical Agent for the Committee on Immigration and Naturalization of the House of Representatives and Eugenics Associate of the Psychopathic Laboratory of the Municipal Court of Chicago and author of a 502-page volume on Eugenical Sterilization in the United

States, gave in testimony by deposition an analysis of the hereditary nature of Carrie Buck (Rec., pp. 29-41.) After reciting Carrie's family and personal history, Dr. Laughlin finds: "All this is a typical picture of a low grade moron. . . . The family history record and the individual case histories, if true, demonstrate the hereditary nature of the feeble-mindedness and moral delinquency described in Carrie Buck. She is therefore a potential parent of socially inadequate or defective offspring." (Rec., p. 35.)

Dr. Laughlin further testified: "Let me say, also, that in the archives of the Eugenics Record Office there are many hundreds of manuscript pedigrees of families with feeble-minded members. These pedigrees prove conclusively that both feeble-mindedness and other intelligence levels are, in most cases, accounted for by hereditary qualities," that the operation of "salpingectomy in the female has but little physiological effect other than sexual sterility." . . . "Modern individual and family history study can, in practically all cases of social inadequacy locate the hereditary factor, if it exists. Thus if a particular person is a 'potential parent of degenerates' the eugenical field worker can generally supply the state authorities with material for a sound diagnosis. . . . Modern eugenical sterilization is a force for the mitigation of race degeneracy which, if properly used, is safe and effective. I have come to this conclusion after a thorough study of the legal, biological and eugenical aspects, and the practical working out, of all of the sterilization laws which have been enacted by the several states up to the present time. . . . I believe the Virginia statute is, in the main, one of the best laws thus far enacted in that it has avoided the principal eugenical and legal defects of previous statutes, and has incorporated into it the most effective eugenical features and the soundest legal principles of previous laws."

Various witnesses having personal knowledge of Carrie and of her family history and of her relatives testified that she was

feeble-minded and immoral, that her child was not normal, that her mother was feeble-minded and that other relatives of hers were below the normal mentally. (Rec., pp. 42-61.)

Dr. J. S. DeJarnette, Superintendent of the largest of the Virginia State Hospitals for the Insane, and having treated more than eleven thousand patients, testified that feeble-mindedness may be inherited, that it is incurable, that it is judicially ascertainable whether or not any particular individual is feeble-minded, that there are certain laws of heredity which are ascertainable and which may be relied on in determining whether or not a feeble-minded patient is likely to be a potential parent of socially inadequate offspring, "well you find feeble-mindedness runs in families. . . . If it is inherited he is likely to transmit it, and I think Mendel's law covers it very well. . . . Now, you take a feeble-minded woman, if she has a child it is very apt to be—that one-fourth of them will be feeble-minded. If both parents are feeble-minded, it is practically certain that the children will all be feeble-minded," that the operation of salpingectomy may be performed upon a woman without detriment to her general health, that in his hospital there were about twenty patients that with benefit to themselves and to society might be brought under this statute, that having heard the evidence as to Carrie he thought she was the probable potential parent of socially inadequate offspring by the laws of heredity, that her offspring would probably be so affected and that her welfare and the welfare of society would be promoted by her sterilization. (Rec., pp. 63-75.)

Dr. A. H. Estabrook, of the Carnegie Institution, having been engaged for fourteen years in assisting in the investigation leading to a formulation of the laws of heredity and having also made some personal investigations of the family history of Carrie, gave in testimony the result of those investigations tending to show the laws of heredity in general with their application to the present case. (Rec., pp. 75-88.)

"A. We find that in general characteristics or traits of the individual, either physical or mental, are inherited in pairs. A person has a characteristic or he does not have it, or he may have the opposite of it. As an example, a person may have six fingers. A normal exception to the condition of six fingers is the ordinary condition of five fingers. We know from observation, and have formulated the law that where we have the six-fingered condition, it is what is called the dominant characteristic; the normal condition of five fingers being the recessive characteristic. That is the dominant and recessive characteristic going together.

Q. Doctor, we are not interested in fingers. I should have narrowed my question to what have you discovered as regards to feeble-mindedness.

A. That reacts in the same respect to the normal, the feeble-minded being the recessive condition, the normal condition of mind being dominant.

Q. What else have you ascertained to govern this?

A. Where feeble-mindedness is found in two strains the two strains meeting, feeble-mindedness will show up in one-fourth of the children. Where feeble-mindedness is found in one parent, that is, and only in the strain—that is, the other parent being normal but coming from a strain where there is feeble-mindedness, one-half of the children will be feeble-minded. Where feeble-mindedness is found in both parents, all the children will be feeble-minded. The rule, so far as we can find, has no exception. Two normal appearing parents, both of whom come from defective strains, will in all probability have at least one-fourth of feeble-minded children. That gives the explanation of where the feeble-minded child comes from in families that are apparently normal. The blood is bad. They carry the defective germ plasm, and where two defectives' germ plasms meet, the effect again appears.

Q. I wish you would illustrate that a little—about the germ plasms. Take cases where you have a feeble-minded father and a feeble-minded mother, or a normal father and a feeble-minded mother, or a normal father and a normal

mother, or what you call a feeble-minded strain in one of them, and show how your laws work out?

A. Two feeble-minded parents will always have feeble-minded children. One hundred per cent of the children of two feeble-minded parents will be feeble-minded. Where one parent is feeble-minded and the other parent normal, we will have one-half the children feeble-minded—if that parent comes from a defective strain. If, however, in this case the parent on one side—the normal parent mated to a feeble-minded woman—if the normal parent comes from a good stock family where there is no mental deficiency; in the first generation none of the children will appear feeble-minded, but all of those children will carry a taint of feeble-mindedness. If one of those children marries back into a good strain, the feeble-mindedness will still be covered. It is a recessive characteristic, but if one of those children mates into a bad stock, irrespective of whether the mate is feeble-minded or not, if he marries into bad stock one-fourth to one-half of the children will be feeble-minded. In other words, it is a trait that is present in the germ plasm of the reproductive part of the individual that determines the offspring, and not the individual. We look upon individuals now as merely offshoots of the stock—the germ plasm is what goes through." (Rec., pp. 78-87.)

Dr. A. S. Priddy, Superintendent of the Colony, with twenty-one years of experience in this and similar institutions, testified as to Carrie: (Rec., pp. 88-98.)

"I arrived at the conclusion that she was a highly proper case for the benefit of the Sterilization Act, by a study of her family history; personal examination of Carrie Buck, and subsequent observation since admission to the hospital covering the whole fields of inquiry connected with the feeble-minded. . . . She was eighteen years old on the second of last July, and according to the natural expectancy, if the purposes of the act chartering this institution are to be observed and carried out, that is to keep her under custody during her period of child-bearing, she would

have some thirty years of strict custody and care, under which she would receive only her board and clothes; would be denied all of the blessings of outdoor life and liberty, and be a burden on the State of Virginia of about $200.00 a year for thirty years; whereas, if by the operation of sterilization, with the training she has got, she could go out, get a good home under supervision, earn good wages, and probably marry some man of her own level and do as many whom I have sterilized for diseases have done—be good wives—be producers, and lead happy and useful lives in their spheres."

". . . She has a feeble-minded mother, a patient in the Colony under my care, who is of lower mental grade than she."

Q. "What is her name?

A. Emma Buck.

Q. She is also a patient in your colony?

A. Yes, sir. She has a mental age of about seven years and eleven months, according to tests put up at that institution, and Carrie has by history and mental examination and observation proved to be feeble-minded herself. There are two direct generations of feeble-minded, and besides, while I don't know anything about their kinship, under my care and observation I have got about eight Bucks and Harlowes, all coming from the Albemarle stock. I won't vouch for their relationship—I don't suppose they know. I have one from Rockbridge County just committed; four from Charlottesville or Albemarle; one from Richmond; one at the Reformatory, and the other in Goochland County.

Q. They all trace back to—

A. All trace back to the Albemarle Harlowes and Bucks.

Q. I will ask you again, what leads you to believe that Carrie Buck, if she had children, would be the parent of defective offspring?

A. In the generally accepted theory of the laws of heredity.

Q. What is her age, mentally?

A. Mentally it is nine years—a middle-grade moron, and the brother of low grade.

Q. Might she be sexually sterilized without detriment to her general health?

A. Absolutely she could.

Q. Would you think her welfare would be promoted by such sterilization?

A. I certainly do.

Q. Why? And how?

A. Well, every human being craves liberty; she would get that, under supervision. She would not have a feeling of dependence; she would be earning her own livelihood, and would get some pleasure out of life, which would be denied her in having to spend her life in custodial care in an institution.

Q. Would you think the public welfare would be promoted by her sterilization?

A. Unquestionably. You mean society in its full scope?

Q. Yes, sir.

A. Well, in the first place, she would cease to be a charge on society if sterilized; it would remove one potential source of the incalculable number of descendants who would be feeble-minded. She would contribute to the raising of the general mental average and standard.

Q. Well, taking into consideration the years of experience you have had in dealing with the socially inadequate, and more particularly with the feeble-minded, what, in your judgment, would be the general effect, both upon patients and upon society at large, by the operation of this law?

A. It would be a blessing.

Q. To whom?

A. To both society and to the individuals on whom the operation is performed.

Q. Of course these people, being of limited intelligence, lack full judgment of what is best for them, but generally, so far as patients are concerned, do they object to this operation or not?

A. They clamor for it.

Q. Why?

A. Because they know that it means the enjoyment of life and the peaceful pursuance of happiness, as they view it, on the outside of institution walls. Also they have the opportunity of marrying men of their mental levels and making good wives in many cases.

Q. Have you had personal observation of that with those you have personally sterilized?

A. From 1916 to about the winter of 1917, for tubal diseases, and a few subsequent to that, we sterilized eighty-odd cases. About sixty of them—we got good homes for about sixty of them. Some returned to their families, and after a period of from six to eight years they have been out of the institution and so far as I know, they have never given the officers of the law any trouble. They have earned their livings, and not one has ever been returned to the institution. Some eight or ten of the cases are known to Mr. White. Nine or ten have married and made good wives."

. . . . . .

Q. "Doctor, about how many patients, taking both men and women, are there in your institution whose condition you think would be improved and who might be better dealt with for their own good and for the good of society if you were free under the provisions of this law, after a hearing, to have this operation performed?

A. Well, I should think from seventy-five to a hundred women. The men have other anti-social tendencies just as glaring as child-bearing, and we would have to keep them there—they rank below the tramps and hoboes.

Q. But you have some seventy-five women there who are suitable for return to society from every standpoint

except that they are of child-bearing age and are likely to have illegitimate children?

A. Yes.

Q. Have you facilities to take care of all patients of this class that would be committed to your hospital?

A. That should be, or would be?

Q. That should be?

A. No, sir, we cannot take in more than one in five at the very outside.

Q. Of course that term 'should be' is susceptible of interpretation. Are you full to capacity?

A. Yes, sir, have a long waiting list. It is impossible to admit them.

Q. If you could get seventy-five vacancies by operating, the condition of these people, in this way, would they fill up with other cases?

A. Yes, sir, and with other cases needing custodial care many of them could be sterilized and got out and we could take care of others."

. . . . . .

Q. "But the statutes of Virginia do provide for the taking of the feeble-minded and caring for them?

A. Yes, sir.

Q. And in theory, they are all in your charge when they are committed to your hospital?

A. Yes, sir, subject to my jurisdiction and subject to the law."

. . . . . .

"I feel that I should state, in a few words, the strong reason for the operation of the sterilization law is that the State contemplates the detention of these women in the institution during their child-bearing period of from twenty-five to thirty years, and by sterilization—an absolutely safe and harmless operation—within three weeks the end that would be attained in twenty-five years would be brought about. They are no worse off when sterilized

surgically than when sterilized by nature after being kept locked up twenty-five or thirty years.

Q. In other words, when segregated, as you do them, they are by segregation effectually prevented from propagating?

A. Yes, sir, and there is another matter to be considered: when you keep these women locked up for twenty-five to thirty years, the door of hope is closed to them. They are unable and incapable of getting out and earning their living.

Q. In other words, you have to train them young, and if you postpone their opportunities for training, they get so they cannot do it?

A. Yes, sir, they become helpless and lose confidence in themselves."

Q. "Doctor, I understand you to say that if this girl could be sterilized the Dobbs' home would be open to her?

A. I understand they want her back.

Q. And the only thing to prevent her having an independent home is her child-bearing capacity?

A. Yes, sir. I don't know that they would be willing to assume the risk as she is now." (Rec., p. 97.)

The Findings of the Circuit Court.

The Circuit Court sustained the statute as a constitutional enactment, found as facts established by the evidence, that the said said Carrie Buck is feeble-minded as defined by the statutes of Virginia for such cases made and provided, that she is a duly committed inmate and patient of the State Colony for Epileptics and Feeble-Minded; that Emma Buck, the mother of the said Carrie Buck, is also feeble-minded and an inmate of the said institution; that the said Carrie Buck is the mother of an apparently feeble-minded infant; that the said Carrie Buck is afflicted with a hereditary form of feeble-mindedness; that the said Carrie Buck was duly proceeded against by the said

A. S. Priddy, Superintendent, before the Special Board of Directors of the State Colony for Epileptics and Feeble-Minded, in strict accordance with all the requirements and provisions of the said Act approved March 29, 1924; and the Court having further found as facts upon the evidence adduced that the said Carrie Buck is feeble-minded and by the laws of heredity is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization, affirmed the order for the sterilization operation. (Rec., pp. 3-4.)

In the Supreme Court of Appeals of Virginia.

Carrie Buck by her guardian and next friend, and the said guardian for Carrie Buck, prosecuted an appeal from the said order of the Circuit Court to the Supreme Court of Appeals of Virginia.

In the petition for that appeal the constitutionality of the said Act was again assailed, the errors assigned being that:

(a) It does not provide due process of law.

(b) It denies to petitioner and other inmates of said institution the equal protection of the laws.

(c) It imposes a cruel and unusual punishment.

The Supreme Court of Appeals of Virginia held:

(1) That "the act complied with the requirements of due process of law" in that the act provides "an adjudication by an impartial tribunal vested with lawful jurisdiction to hear and determine the questions involved, after reasonable notice to the parties interested and an opportunity for them to be heard," which "fulfills all the requirements of due process of law." (Rec., pp. 101-103.)

(2) That "the contention that the statute imposes cruel and unusual punishment cannot be sustained.

"The act is not a penal statute. The purpose of the legislature was not to punish but to protect the class of socially inadequate citizens from themselves, and to promote the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people of the state."

. . . . . .

"The constitutional prohibition against cruel and unusual punishment, Virginia Bill of Rights, Section 9, has reference to such bodily punishments as involve torture and are inhumane and barbarous, and has no application to the case at bar." (Rec., p. 104.)

(3) That the statute does not "deny to appellant and other inmates of the Colony the equal protection of the law," because,

(a) It is a valid exercise of the police power.

(b) The classification made by the statute is reasonable, in that under the statutes of Virginia all persons found by an inquisition to be feeble-minded are subject to commitment to the Colony. "The status of a feeble-minded person, who comes under the operation of the sterilization act is not fixed until such patient, after judicial commitment to the Colony, shall have undergone expert observation for at least two months and been subjected to the Binet Simon measuring scale of intelligence, or some other approved test of mentality, and found to be feeble-minded. Code 1919, Sec. 1083."

The case is brought to this Court for review under the provisions of Section 237 of the judicial code, the decision of the Supreme Court of Appeals of Virginia, the highest court of that state, having sustained the validity of the Virginia Sterilization Statute cited which was there drawn in question on the ground that it was repugnant to the Constitution of the United States.

Novelty of the Question Presented.

It will be observed that the principal question presented is of first impression in this jurisdiction and quite novel in any jurisdiction.

What power has society to protect its afflicted members from themselves and itself from them, and beyond that, what is its power and duty as to the coming generation in respect of the multiplication of socially inadequate defectives?

If as tradition tells us some of the ancients exposed to the elements the more puny infants that they might not grow up to lives of suffering and to burden the State, the idea of limiting in some way the propagation of the unfit it not altogether new. Has human progress in the development of surgery and of the science of heredity and eugenics brought it to pass that a like end may be accomplished by society more humanely and even with benefit to the already afflicted individual?

Evidently the General Assembly of Virginia so concluded when it enacted the Act under review for the preamble to the Act discloses that this exercise of the legislative will was based upon the motive to promote both the welfare of the individual patient and of society by surgical processes to be performed in the light of ascertained laws of heredity that through such an operation the patient might be restored to the larger liberty of he world outside of custodial walls and this without jeopardy to society.

That such legislation should have passed both houses of the General Assembly of Virginia by unanimous votes when the legislative records of comparatively recent years show that like measures were theretofore overwhelmingly defeated suggests a growth of both sentiment and knowledge upon the subject.

Indeed, the laws of heredity are of but recent discovery. Says Professor East, of Harvard University, in a most informing essay in *Scribner's Magazine* for July, 1925, upon "Heredity—The Master Riddle of Science":

> "This is a courtesy title like that of the retired army officer. Heredity has been until lately the master riddle of science. Twenty-five years ago it was a synonym for mystery and a text for discourses on the unknowable. Not

so to-day. In a quarter of a century laws of heredity have been formulated as definite and precise as those of physics and chemistry. The mechanics of the two tiny cells which unite to hand the spark of life from generation to generation in our world of animals and plants have been analyzed with a clear-cut accuracy hardly to be expected when dealing with such entangled phenomena."

It is just within this past twenty-five years as the light of science has brought the laws of heredity from the shadows of ignorance that legislative bodies have sought to use the knowledge of these laws in solving the problems of promoting the welfare and of the propagation of defectives.

Court Decisions Upon Similar Enactments.

Some sixteen of the states have endeavored by statute to deal with this problem.

The Virginia statute is believed to be unique among and to be distinguished from other similar enactments in that it requires a judicial determination that the welfare of the patient will be promoted as a condition precedent to a sterilization order.

The State of Washington by statute (Rem. and Bal. Code, §2287) provided for the operation of vasectomy for the prevention of procreation as a part of the punishment that might be imposed in certain cases. The Constitution of Washington (Art. 1, §14) contained a prohibition against the infliction of cruel punishments. In Feilin's Case (70 Wash. 65, 126 Pac. 75, 32 Ann. Cas. 512), decided by the Washington Supreme Court, September 3, 1912, it was said:

> "Guided by the rule that, in the matter of penalties for criminal offenses, the courts will not disturb the discretion of the legislature save in extreme cases, we cannot hold that vasectomy is such a cruel punishment as cannot be inflicted upon appellant for the horrible and brutal crime of which he has been convicted."

In New Jersey the Board of Examiners created by "an act to authorize and provide for the sterilization of feeble-minded (including idiots, imbeciles and morons), epileptics, rapists, certain criminals and other defectives" (N. J. P. L., 1911, 353), ordered that the operation of salpingectomy be performed on an epileptic inmate of a state charitable institution as the most effective operation for the prevention of procreation. In the case of *Smith* v. *Board of Examiners of Feeble-Minded* (N. J.—88 Atl. 963, 32 Ann. Cas. 515), the Court held that the statute in question was based on a classification that bore no reasonable relation to the object of such police regulation, and hence denied to the individuals so selected (inmates of state institutions) the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The foregoing may, perhaps, be accurately termed both the earliest and the two leading cases upon the subject.

It will be observed that while the motive of the Washington statute was punitive, it was also eugenical in its operation. The New Jersey statute was purely eugenical. Other statutes suggest a therapeutic motive—the welfare of the patient though in operation they would be eugenical also.

Similar legislation has run a varied course both with the law-making authorities and in the courts.

The governors of Pennsylvania (Pennypacker, 1905; Sproul, 1921), Oregon (Chamberlin, 1909), Vermont (Fletcher, 1913), and Nebraska (Davis, 1913) have vetoed sterilization bills passed by their respective states. Of these states, however, Nebraska and Oregon finally succeeded in securing sterilization statutes.

In *Rudolph Davis* v. *William H. Berry et al.* (216 Fed. 419) the Iowa statute was held invalid as a bill of attainder, providing for a cruel and unusual punishment and having no provision for due process of law. This case came to this Court but

was not here decided upon the merits because pending the appeal the statute involved was superseded by the enactment of a substantially different statute upon the same subject. *Berry* v. *Davis*, 242 U. S. 468.

No other case involving a like statute appears to have reached this Court.

In *Haynes* v. *Williams* (166 N. W. 938—Mich.), the Michigan statute was held unconstitutional as not affording those affected by it the equal protection of the laws.

The Supreme Court of Indiana, May 11, 1921, in *Smith* v. *Williams*, 131 N. E. 2 (Ind.), held the Indiana statute invalid, saying:

> "In the instant case the prisoner has no opportunity to cross-examine the experts who decide that this operation should be performed upon him. He has no chance to bring experts to show that it should not be performed; nor has he a chance to controvert the scientific question that he is of a class designated in the statute. And wholly aside from the proposition of cruel and unusual punishment, and infliction of pains and penalties by the legislative body through an administrative board, it is very plain that this act is in violation of the Fourteenth Amendment of the Federal Constitution in that it denies appellee due process."

With the exception of the Virginia decision now here under review it is believed that the case of *Smith* v. *Command*, decided by the Supreme Court of Michigan, June 18, 1925, 204 N. W. 140; 40 A. L. R. 515 and note, is the latest decision of any state court of last resort upon a similar enactment.

The decision in *Smith* v. *Command* was by a divided court. The opinions by the majority and by the minority of the Court are both notable for the breadth of view and historical research in eugenics and learning displayed and for the reviews made of previous decisions and of the principles involved, legal and scientific.

In *Smith* v. *Command* the majority of the Court held:

> "The State may under its police power provide for sterilization of feeble-minded persons; that such sterilization is not prevented by a constitutional prohibition of cruel and unusual punishment; that provision for sterilization of mental defectives with sexual inclinations, where it is probable that their children would have an inherited tendency to mental defectiveness, without including other classes of mental defectives, is not an unreasonable classification which deprives the included class of the equal protection of the law; that so much of a statute providing for sterilization of mental defectives as applies to those who probably cannot support their children makes an arbitrary classification and deprives them of the equal protection of the law, but that the invalidity of this part of the statute did not render the valid classification aforesaid invalid. But it was held that the order for sterilization must be vacated and set aside on account of the failure to follow the practice provided by the statute."

It will be observed from the foregoing cases, which are fairly typical of the limited numbed of court decisions upon the subject, that none of them holds that the State is without the power in question provided it be exercised through a statute that both affords due process of law and operates alike upon all individuals of the class affected, but those courts which follow the New Jersey case hold that limiting the operation of such a statute to inmates of State custodial institutions denies such inmates the equal protection of the laws and renders the statute unconstitutional and *in toto*.

When it is considered that those who are subject to commitment to these institutions constitute classes well defined by the statutes (Va. Code, §§1066-1077), and thus become because of mental defectiveness wards of the State, and being because of mental defects themselves incapable of deciding what is best for themselves, can it be said that it involves an unreasonable classification to provide for them tribunals judicially to de-

termine what in the respect indicated will promote their welfare and having so found to order their sterilization—an adjudication which the Virginia statute requires further to be supported by the finding that the action proposed will also promote the public welfare?

It is submitted that an examination of the decisions in the foregoing cases from other jurisdictions so far as they may appear adverse to the contentions here made will disclose that those decisions were based upon conditions not found in the Virginia statute or upon conclusions otherwise unsound in the light of the provisions of the Virginia Act and the facts in the record of the case at bar.

The Constitutional Provisions Involved.

The Constitution of Virginia.

Section 1 of Article I, the Bill of Rights, in the Constitution of Virginia provides:

> "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

Among the liberties of the citizen which are thus guaranteed is the right to follow such pursuits as he may deem best adapted to his faculties and will afford him the highest enjoyment, to be free in the enjoyment of all of his faculties, to be free to use them in all lawful ways, to live and work where he will, and to earn his livelihood by any lawful calling. *Young* v. *Com.*, 101 Va. 853, 45 S. E. 327.

Section 9 of the same Bill of Rights provides:

> "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Eighth Amendment of the Constitution of the United States provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States provides, among other things:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It may be conceded that the liberty to have children is a right within the protection of the constitutional provisions quoted and that no citizen against his will may be deprived of that right without due process of law, or by a law that may not operate uniformly upon persons similarly situated when not unreasonably classified.

This much being conceded it remains to inquire in what right the Virginia statute under review may be sustained.

By way of answer to this inquiry counsel for the defendant in error submit the following:

ARGUMENT.

POINT I.

THE ACT DOES NOT IMPOSE CRUEL AND UNUSUAL PUNISHMENT.

At the outset it may be observed under this head of the discussion that the act is not a criminal statute nor has it any punitive motive and therefore that the constitutional provisions having in contemplation criminal enactments have no application. This consideration alone it is submitted is conclusive.

Further, the statute provides no "punishment" at all but on the contrary is designed to be beneficial and remedial for those within its terms. Even for the liberty it may take away—if there can be liberty to procreate when one is already in permanent custodial care under conditions of physical separation expressly designed to prevent procreation—it returns a larger liberty in freedom from confinement. This is relief, not punishment.

Again, the evidence establishes that the operation contemplated is practically painless and without appreciable risk to health or life and therefore also is not at all within the intendment of the constitutional provisions in issue.

It is generally held that a constitutional provision prohibiting the infliction of cruel and unusual punishment applies to and is directed against punishment of a barbarous character, involving torture, such as drawing and quartering the culprit, burning at the stake, cutting off the nose, ears or limbs, and the like and such punishments as were regarded as cruel and unusual at the time the constitution was adopted.

Hart v. *Com.*, 131 Va., at pages 741 and 748.
In re Kemmler, 136 U. S. 436; 10 Sup. Ct. 930; 34 L. Ed. 519.
Collins v. *Johnson*, 237 U. S. 509; 35 Sup. Ct. 649; 59 Law Ed. 1071.
Weems v. *U. S.*, 217 U. S. 349; 54 L. Ed. 793, 30 Sup. Ct. Rep. 544; 19 Ann. Cas. 705, and cases cited.

To the *Weems Case* as reported in 19 Am. & Eng. Ann. Cas., at page 725, is appended an exhaustive note on what is cruel and unusual punishment.

In *State* v. *Feilin*, 70 Wash. 65, 32 Ann. Cas. 1914B, 512, which was a criminal case, it was expressly held that an asexualization operation, vasectomy in that case, was not a cruel punishment.

Finally and conclusively this Court held in the *Weems Case, supra,* that the provision in the Federal Constitution (amendment 8) does not apply to State legislatures.

In no aspect of the matter therefore it is submitted can the act here in issue be fairly brought within the constitutional prohibitions against cruel and unusual punishments.

POINT II.

The Act Affords Due Process of Law.

"Due process of law" requires (1) A duly established impartial tribunal having (2) lawful jurisdiction to hear and determine only after (3) previous reasonable notice and (4) an opportunity to be heard, before any binding order can be entered affecting a person's liberty.

The statute here provides and the record upon this appeal shows that every one of these four essential requisites named have been met—(1) The Special Board of Directors of the Colony was by the statute made the tribunal and (2) given jurisdiction to hear and determine, and after (3) the thirty days' previous notice given pursuant to the statute to the patient, her only surviving parent, and a guardian appointed by the Court to protect her interest in the proceeding, that Board (4) with the patient and her guardian present and participating in the hearing determined the matter, which judgment was afterwards with notice and further opportunity to be heard reviewed in the Circuit Court upon appeal with the further right of appeal to the Supreme Court of Appeals of Virginia evidenced in consummation by this present appeal.

Here it is therefore submitted all the requirements of due process of law have been fully complied with.

> "It is very true that 'due process of law' requires that a person shall have reasonable notice and opportunity to be heard before an impartial tribunal before any binding

decree or order can be made affecting his rights to liberty or property; but this constitutional safeguard cannot avail appellee upon the uncontradicted facts as to the proceedings before the Board of Fisheries and the Commission of Fisheries touching this controversy. The proceedings were had before the Board of Fisheries and its successor in office, a department of the State government, to whose judgment and discretion the legislature has committed the supervision and control of the natural oyster-beds, rocks and shoals within the waters of the Commonwealth, as well as the oyster industry of the Commonwealth, and made the decision of that tribunal conclusive of all controversies with respect to the same. The proceedings in this case before that tribunal were in strict accordance with the requirements of the statute, and not only did appellee have reasonable notice thereof, but every reasonable opportunity to be heard and was heard from time to time before the order it now complains of was made by the board. It would be difficult to find a case in which the required 'due process of law' has been more fully met and complied with.

In the case of *Reetz* v. *Michigan*, 188 U. S. 505, 47 L. Ed. 563, 23 Sup. Ct. 390, in point here, the following is quoted from the opinion of Mr. Justice Matthews in *Hurtado* v. *California*, 110 U. S. 516, 28 L. Ed. 232, 3 Sup. Ct. 111, 292, reviewing at length the authorities and discussing the elements of due process of law: 'It follows that any legal proceeding enforced by public authority, whether sanctioned by age or custom or merely devised in the discretion of the legislative power, in the furtherance of the general public good, which regards and preserves those privileges of liberty and justice, must be held to be due process of law.' See also *Murray* v. *Hoboken L. Co.*, 18 How. 272, 15 L. Ed. 372; Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552, 2 Sup. Ct. 569."

Commission v. *Hampton &c. Co.*, 109 Va. 565, at pages 585 and 586.

See also *Mallory* v. *Va. Colony Feeble-Minded*, 123 Va. 205.

"What is due process of law is not easily defined. Generally speaking, the 'law in its regular course of administration through courts of justice is due process.'

Equal protection of the laws does not guarantee to all persons in the United States, or in a single state, the benefits of the same laws and the same remedies. Every Legislature may, subject to constitutional limitations, prescribe what evidence shall be received in courts of its own jurisdiction.

The Fourteenth Amendment to the Constitution of the United States does not forbid the passage by the Legislature of a law which applies to a class only, provided the classification be reasonable and not arbitrary, and applies alike to all persons similarly situated. Whether the classification is reasonable is a question primarily for the Legislature. It is presumed to be necessary and reasonable, and the courts will not substitute their judgment for that of the Legislature, unless it is clear that the Legislature has not made the classification in good fairh."

Anthony v. *Commonwealth*, 128 S. E., p. 635.

. . . . . .

"In *Brown* v. *New Jersey*, 175 U. S. 172, 20 S. Ct. 77, 44 L. Ed. 119, Mr. Justice Brewer, speaking for the Court said:

"So, in *Hayes* v. *Missouri*, 120 U. S. 68 (7 S. Ct. 350, 30 L. Ed. 578), it appears that a certain number of peremptory challenges was allowed in cities of over 100,000 inhabitants, while a less number was permitted in other portions of the State. It was held that that was no denial of the equal protection of the laws, the court saying, page 71: 'The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' . . ." Idem, page 635.

"In *Hayes* v. *Missouri*, 120 U. S. 68, 7 S. Ct. 350, 30 L. Ed. 578, Mr. Justice Field, speaking for the court said:

'The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.'

"In *Twining* v. *New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97, speaking for the court, Mr. Justice Moody said:

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (24 L. Ed. 565); *Scott* v. *McNeal*, 154 U. S. 34 (14 S. Ct. 1108, 38 L. Ed. 896); *Old Wayne Life Association* v. *McDonough*, 204 U. S. 8 (27 S. Ct. 236, 51 L. Ed. 345), and that there shall be notice and opportunity for hearing given the parties (*Hovey* v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215; *Roller* v. *Holly*, 176 U. S. 398, 20 S. Ct. 410, 44 L. Ed. 520), and see *Londoner* v. *Denver*, 210 U. S. 373, 28 S. Ct. 708, 52 L. Ed. 1103. Subject to these two fundamental conditions, which seem to be universally prescribed here in all systems of law, established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law." Idem, page 636.

"In 1 Dillon, Municipal Corporations (5th Ed.) § 146, the law is stated thus:

' . . . The Legislature may determine what difference in situation, circumstances and needs call for a difference of class, subject to the supervision of the courts, as the final interpreters of the Constitution, to see that it is actually classification, and not special legislation under that guise. The presumption is always in favor of the legislative command, and it must prevail unless clearly transgressing the constitutional prohibition. If the distinctions are genuine and not merely artificial and irrelevant means of evading the constitutional prohibition, the courts must declare the classification valid, though they may not

consider it to be on a sound basis. The test is, not wisdom but good faith in the classification.'

"Having under consideration the question of the effect of the equal protection clause of the Fourteenth Amendment upon class legislation by the state, the Supreme Court of the United States, in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 78, 31 S. Ct. 340, 55 L. Ed. 369, Ann. Cas. 1912C, 160, said:

"A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. . . . When the classification . . . is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. . . . One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." (Pages 636-7.)

Anthony v. *Commonwealth* (Va.) 128 S. E., 633.

POINT III.

The Act is a Valid Exercise of the Police Power.

1. IN GENERAL.

That the insane, feeble-minded and other defectives in proper cases and by due process of law, as in the present case, may be taken and kept in custody by the State and so deprived of the liberty otherwise protected by constitutional sanctions is beyond question. This the State does in the exercise of its police power.

The courts generally are indisposed to suffer the police power to be impaired or defeated by constitutional limitations.

"In *Barbier* v. *Connolly*, 113 U. S. 27, 31, 5 S. Ct. 357, 359, 28 U. S. (L. Ed.), 923, Mr. Justice Field, in speaking of the effect of the Fourteenth Amendment of the Federal Constitution upon exercise by a State of its police power, says: 'But neither the amendment, broad and compre-

hensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity'."

Shenandoah Lime Co. v. *Governor*, 115 Va. 875; 37 Ann. Cas. 975.

Section 159 of the Constitution of Virginia provides that "the exercise of the police power of the State shall never be abridged."

"The authorities show that the courts generally are indisposed to suffer the police power to be abridged or defeated by constitutional limitations. It is possible, of course, for the Constitution to impose such limitations, but they must be clearly imposed or there are no such limitations. The police power is not paramount to the Constitution, but its free exercise is never interfered with unless plainly in conflict therewith. *Shenandoah Lime Co.* v. *Governor*, 115 Va. 874, 80 S. E. 753, Ann. Cas. 1915C, 973. The power of the state not only embraces regulations designed to promote public convenience and general prosperity, but also such regulations as are designed to promote the public health, public morals, or the public safety. *Chicago, B. & Q. R. Co.* v. *Illinois*, 200 U. S. 592, 26 Sup. Ct. 341, 50 L. Ed. 609, 4 Ann. Cas. 1175.

In *Eubank* v. *Richmond*, 226 U. S. 142, 57 L. Ed. 158, 33 Sup. Ct. 77, 42 S. R. A. (N.S.) 1123, Ann. Cas. 1914B, 192, we find this as to the police power: 'That power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general prosperity. (*Chicago, B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 50 L. Ed.

596, 26 Sup. Ct. 341, 4 Ann. Cas. 1175.) And further, 'it is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of the government.' (*District of Columbia* v. *Brooke*, 214 U. S. 138, 149, 53 L. Ed. 941, 945, 29 Sup. Ct. 560.) But necessarily it has its limits and must stop when it encounters the prohibition of the Constitution. A clash will not, however, be lightly inferred. Governmental power must be flexible and adaptive. Exigencies arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a struggle in judgment to decide whether it must yield to the higher considerations expressed and determined by the provisions of the Constitutions. *Hoble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N.S.) 1062, Ann. Cas. 1912A, 487. . . . But in all cases there is the constant admonition, both in their rule and examples, that when a statute is assailed as offending against the higher guaranties of the Constitution, it must clearly do so to justify the courts in declaring it invalid."

Strawberry &c. v. *Starbuck*, 124 Va. 71, at pages 87-88-89.

VACCINATION STATUTES.

An exercise of the police power analagous to that of the statute here in issue may be found in the compulsory vaccination statutes for there, as here, a surgical operation is required for the protection of the individual and of society and that requirement has been upheld when imposed upon school children only, those attending public institutions of learning, though not imposed upon the public as a whole.

In *Jacobson* v. *Massachusetts*, 197 U. S. 11; 3 Ann. Cas. 765, the Supreme Court of the United States said:

"The authority of the state to enact this statute is to be referred to what is commonly called the police power—a power which the state did not surrender when becoming a member of the union under the Constitution. Although this court has refrained from any attempt to define the

limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description'; indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the peoples of other states. According to settled principles the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. *Gibbons* v. *Ogden, 9 Wheat.* (U. S.) 1, 203; *Hannibal, etc. R. Co.* v. *Husen,* 95 U. S. 465, 470; *Boston Beer Co.* v. *Massachusetts,* 97 U. S. 25; *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650, 661; *Lawton* v. *Steele,* 152 U. S. 133. . . .

"We come, then, to inquire whether any right given or secured by the Constitution is invaded by the statute as interpreted by the state court. The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and therefore hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a funda-

mental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged principles ever can be, made, so far as natural persons are concerned.' *Hannibal, etc. R. Co.* v. *Husen*, 95 U. S. 465, 471; *Missouri, etc. R. Co.* v. *Haber*, 169 U. S. 613, 628, 629; *Thorpe* v. *Rutland, etc. R. Co.*, 27 Vt. 140, 148. In *Crowley* v. *Christensen*, 137 U. S. 86, 89, we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.'

. . . . . .

"It is said, however, that the statute, as interpreted by the state court, although making an exception in favor of children certified by a registered physician to be unfit subjects for vaccination, makes no exception in the case of adults in like condition. But this cannot be deemed a denial of the equal protection of the laws to adults: for the statute is applicable equally to all in like condition, and there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years."

See also *Viemeister* v. *White*, 179 N. Y. 235, 1 Am. & Eng. Ann. Cas. 334.

LIBERTY OF PLAINTIFF IN ERROR ALREADY RESTRICTED.

As we have seen, the State may and does confine the feeble-minded, thus depriving them of liberty. When so confined they

are by segregation prohibited from procreation—a further deprivation of liberty that goes unquestioned.

Again by statute in Virginia it is provided:

> "§5088b. Unlawful marriage of such persons.—If any man or woman shall knowingly marry any person lawfully adjudged to be insane, epileptic or feeble-minded, and duly admitted as a patient or inmate in any State hospital or colony for the insane, epileptic or feeble-minded, whether such person be actually confined in a hospital or colony or in the custody of some person on bond or furlough or at large as an escape patient or inmate, he or she shall be guilty of a misdemeanor, and on conviction thereof shall be confined in jail not exceeding six months or fined not exceeding five hundred dollars, or both. Any such marriage, if attempted to be entered into, shall be absolutely void without any decree of divorce or other legal process."
>
> Acts 1922, p. 470; Michie's Code, Sec. 5088b.

See also Acts 1924, p. 666; Acts 1918, p. 478; Michie's Code, Secs. 4414, 5088a.

The appellant, Carrie Buck, is under the foregoing statutes already by law prohibited from procreation.

The Question Narrowed.

The precise question therefore here presented is whether the State in its judgment of which is best for appellant and for society may through the medium of the operation provided for by the sterilization statute restore to her the liberty, freedom and happiness which thereafter she might safely be allowed to find outside of institutional walls.

But it is contended that the State may not so legislate for Carrie and others similarly situated and in its custody, as she is, without bringing under the mandate of the same statute those likewise afflicted in mind but who have not been committed to custodial institutions, that to give to Carrie her freedom through an operation while not imposing the same

operation upon others already free is to deny Carrie the equal protection of the laws.

It is submitted that this reasoning will not stand up under examination in the light of accepted principles.

The Operation Not Illegal in Itself.

The operation involved is not damaging to health. The record here shows that this operation is not infrequently performed for the sole purpose of promoting health even when sterilizatin is not sought, though sterilization results. (Rec., pp. 89, 90, 92.)

No legal reason appears why a person of full age and sound mind and even though free from any disease making such operation advisable or necessary may not by consent have the operation performed for the sole purpose of becoming sterile, thus voluntarily giving up the capacity to procreate. The operation therefore is not legally *malum in se*. It can only be illegal when performed against the will or contrary to the interest of the patient.

Who to Consent for the Plaintiff in Error.

Who then is to consent or decide for Carrie whether it be best for her to have this operation?

She cannot determine the matter for herself both because being not of full age her judgment is not to be accepted nor would it acquit the surgeon, and because also besides being under age, she is further incapacitated by congenital mental defect.

Her father is dead, her mother is mentally incapacitated and herself under custodial care. Carrie has no other natural guardian and is herself a very ward of the State, so that who indeed is here but the State, acting through appropriate officers, agents, instrumentalities and tribunals, to decide for Carrie, and for others like her whom it has taken into custody, whether it

be better for her and them to have the operation in question and thereby qualify for readmission to the outside world and its larger freedom rather than have to languish for many years under institutional care and custody deprived of much happiness?

Poor the Commonwealth in powers and helpless in authority if she be incompetent thus to act for her afflicted children.

And to preserve what liberty is it that the State would be thus denied? Carrie's natural freedom to bear children—that is already taken away by other statutes which both incarcerate her and forbid her marriage in or out of the institution. If not so taken away, in what right either to herself or to the likewise afflicted offspring that she might bear or to society itself whose burden such offspring would be, could she be justified in bringing another such child into the world? Surely any right that she might so claim must give way to the larger right of society to protect her, her offspring and society itself humanely against such afflictions and burdens.

2. THE STATUTE IS PART OF A GENERAL PLAN APPLICABLE TO ALL FEEBLE-MINDED.

The statute is in effect applicable to all feeble-minded persons, for all feeble-minded persons are subject to commitment. That all feeble-minded are not in fact proceeded against and committed does not alter the situation which makes all the feeble-minded subject to the sterilization statute through the liability they are under to be committed if and when and after they are so proceeded against.

The State has provided that all feeble-minded persons who under the laws of heredity are likely to become parents of offspring likewise afflicted and who are within the other terms of the statute may first by commitment and afterwards by petition of the Superintendent of the institution be brought under the operation of the sterilization act.

Further the State provides extraordinary care in the determination of who shall have the status of feeble-minded. Not until after there has been both a judicial commitment and expert observation in an institution for at least two months is that status fixed and then the person and all the persons of the status so determined come under the operation of the sterilization act if otherwise within its terms. Code, Sec. 1083.

Statutes for the Feeble-Minded in *pari materia*.

The following extracts from the general statutes of the State may be helpful to a better understanding of the status of the feeble-minded and the care provided for them:

> "§1075. Feeble-minded person and idiot defined.—The words 'feeble-minded person' in this chapter shall be construed to mean any person with mental defectiveness from birth or from an early age so pronounced that he is incapable of caring for himself or managing his affairs, or of being taught to do so, and is unsafe and dangerous to himself and others, and to the community, and who consequently requires care, supervision and control for the protection and welfare of himself, others and the community, but who is not classible as an 'insane person' as usually interpreted."
>
> . . . . . .
>
> "§1077. Who is to be received in the State colonies for epileptics and feeble-minded; employment, training of patients. education, et cetera.—The superintendent of the State colony for epileptics and feeble-minded, shall receive and care for such feeble-minded white persons who are legal residents of Virginia as under the laws of the State may be committed to the said colony provided that in committing persons to the said colony and in receiving them therein, those indigent white persons who would be most likely to receive benefit from colony care and training, women of child-bearing age, from twelve to forty-five years of age, and children not under eight years of age, to whom such training would be of most benefit, shall, as

far as practicable, be first received and admitted. And in order to promote the object for which the said colony is established for the protection of society and feeble-minded persons themselves, and that those who are capable of being trained so as to support themselves may eventually leave the institution and enjoy the life and liberty of the outer world, the superintendent thereof and the said special board of directors shall, as far as practicable, provide suitable employment for such patients and such training, both educational and industrial, as may be adapted to their capacities, and shall see that such moral, medical and surgical treatment as they may deem proper shall be given such patients in order to promote the objects for which the institution is provided."

. . . . . .

"§1078. Petition to have person declared feeble-minded.—No feeble-minded person shall be sent to any institution, except as hereinbefore or hereafter provided. When any person residing in this State shall be supposed to be feeble-minded, any reputable citizen of the State may file a petition in the circuit court of the county, or corporation court of the city, or with the judge thereof in vacation, or before any justice in the city or county in which such alleged feeble-minded person is found, setting forth under oath the circumstances indicating the feeble-mindedness of the person named, the facts of his social and financial condition and surroundings, and the names and financial condition of the person, if any, having the custody or control, and on whom he is dependent, together with the names of his parents, or guardian, if he be a minor, or the next of kin, if any person occupying any of these relations to the person suspected of being feeble-minded be known to the petitioner to be living in the county or city in which the petition is filed."

. . . . . .

"§1083. Tests of mentality of patients.—On the admission of a feeble-minded person into an institution, pursuant to the provisions of this chapter, the superintendent of the institution shall cause the mental condition

of such person to be examined, and said person placed under special observation for a period of not less than two months, during which time such person shall be subjected to the Binet Simon measuring scale for intelligence, or some other approved test of mentality, to be applied by the superintendent of said colony and by an expert designated by him and approved by the special board of directors of the institution or colony; and if, in their opinion, such person is not feeble-minded within the meaning of this chapter, or is not a suitable subject for care and treatment, at the colony or hospital he shall be returned to the city, county or institution from which he was committed, at the expense of such county, city, or institution."

. . . . . .

"§1091. Feeble-minded persons; how furloughed, paroled and discharged from colonies.—. . . The superintendents of the said colonies shall not furlough any female of child-bearing age whose immoral or incorrigible tendencies render it unsafe for herself or society, in his opinion, to be at large. The said superintendent may also parol on their own recognizance such feeble-minded persons of the higher mental grade, who in his opinion, after due observation and proper treatment, are capable of earning his or her own living and of conducting himself or herself in a law-abiding manner." Michie's Code, Secs. 1075, 1078, 1080, 1083, 1091.

Plaintiff in Error's Position Contrasted with that of the Uncommitted Feeble-Minded.

Having seen the situation in which the appellant, Carrie Buck, is found as a committed patient of the Colony, let her situation in respect of liability to sterilization be compared with that of the feeble-minded woman of like age, condition and heredity who has not been committed, that such comparison may disclose whether the law bears so unequally upon Carrie as to be an illegal discrimination against her.

If the woman outside were not subject to commitment under the general laws applicable to all and could not thus through

commitment be brought within the operation of the sterilization act, it might with some appearance of just plausibility be contended that there is discrimination. But such is not the case, for the woman outside, if feeble-minded and otherwise qualified, may by the same process through which Carrie went first, commitment and afterwards a sterilization hearing—be sterilized, so that neither she nor Carrie is denied the equal protection of the laws.

If it be impracticable, as likely it is because of their number, that all the feeble-minded shall be taken into custodial care in institutions, the State should not be denied the power through an "in and out system" to take in such as it may and discharging such of these as it may after proper treatment, to make way for others until all shall be reached.

The Broad View.

Taking therefore that broad view of the subject which it should have and construing the sterilization act along with the other statutes in *pari materia* as affecting the feeble-minded, it is found that, in the beneficent exercise of its police power both to ameliorate the condition of those so afflicted and to promote the general welfare, the Commonwealth has provided a general scheme and plan applicable to all feeble-minded and having only such provisions of flexibility as may make it properly meet the special needs of individual cases.

This being true, it is submitted that the sterilization act as a part of a coördinated plan of legislation applying to all feeble-minded alike is not obnoxious to the objection that it denies the equal protection of the laws to appellant and should be sustained and the order below affirmed.

3. THE STATUTE MAY BE SUSTAINED AS BASED UPON A REASONABLE CLASSIFICATION.

If, notwithstanding the considerations already stated, doubt remains whether the statute in question may not by cutting in

two a natural class arbitrarily make an unreasonable classification and applying to one of the two classes thus arbitrarily made a requirement not made applicable to the other and thus become obnoxious to the equality clause of the Federal Constitution, as is urged in appellant's petition for this appeal, then it is submitted:

1. As has already been demonstrated, since the feeble-minded outside of State Institutions are under the general statutes subject to commitment thereto and may thus be brought within the operation of the sterilization act in the same way that appellant has been so brought, the act thus reaches the whole class of the feeble-minded whether in or out of custody, commitment to the custody of a state institution to which all of the class alike are liable being but one step in the process of sterilization.

2. The fact of custody itself constitutes a reasonable basis of classification because—

(a) Thereby the patient is deprived of her liberty, and her status in respect of freedom of employment, occupation and movement is completely changed.
(b) She can no longer make decisions for herself or have them made by her natural guardians.
(c) She becomes the ward of the State which takes over her support and welfare.
(d) She may have her liberty and freedom of action restored only to such extent and upon such conditions as the State may determine.
(e) She becomes indeed of a class set apart, all of whose living conditions have been taken in charge by the State which must legislate for her and her class thus made because of their peculiar situation or else they must suffer.

These are certainly "common disabilities" which set aside those in custody marking them as proper objects for the operation of even special or class legislation.

CLASSIFICATION PERMITTED UNDER THE CONSTITUTION.

"Although class legislation is prohibited by the federal guaranty as to the equal protection of the laws, yet this does not prohibit a reasonable classification of persons and things for the purpose of legislation, but such classification is distinctly contemplated by this amendment. Hence as far as the federal constitution is concerned the state may classify persons and objects for the purpose of legislation if the classification is based on proper and justifiable distinctions, considering the purpose of the law."

. . . . . .

"A statute or ordinance depriving one of liberty or property does not amount to a denial of the equal protection of the laws because it does not apply to all persons within the jurisdiction of the legislative body enacting it, but is applicable only to certain of such persons. Under certain restrictions a legislative body has a right to discriminate amongst those persons and to limit the application of its laws to a portion of them only. The mere fact that legislation is based on a classification and is made to apply to certain persons, and not to others, does not affect its validity, if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions."

. . . . . .

"If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the fourteenth amendment allows it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law. It is also unquestioned but that legislative classification may in many cases properly rest on narrow distinctions."

. . . . . .

"In the exercise of its power to make classifications for the purpose of enacting laws over matters within its jurisdiction the state is recognized as enjoying a wide range of discretion. The question of classification is primarily for the legislature, and it can never become a judicial ques-

tion except for the purpose of determining in any given situation, whether the legislative action is clearly unreasonable.

". . . Where there is a reasonable and practical ground of classification for legislative regulations under the police power, the classification should be sustained, even though some other classification or the absence of specific classifications would appear to some minds to be more in accord with the general welfare, since the discretion of selecting the subject of police regulations and the nature and extent of such regulations is left to the general law making power where there is no undoubted and irreconcilable conflict between the regulations and the provisions and principles of organic law."

. . . . . .

"One who assails the classification in a law must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary, and not merely possibly, but clearly and actually unreasonable.

. . . . . .

"Minors are peculiarly entitled to legislative protection and form a class to which legislation may be exclusively directed without falling under the constitutional prohibition of special legislation and unfair discrimination."

6 R. C. L. Article Constitutional Law, Secs. 369 to 387, pp. 373-394, and cases cited.

"The equal protection clause of the fourteenth amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without reasonable basis, and there is purely arbitrary.

Polylaise v. *Com.*, 114 Va. 850, 76 S. E. 897.

"Police power is the name given to that inherent sovereignty which is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to in-

sure in any respect such economic conditions as an advancing civilization of a highly complex character requires."

8 Cyc, 863, and cases cited.

In the limits of a brief it would be impracticable to review any considerable part of the great multitude of cases, both State and Federal, that have arisen under the equality clause. Many of them are cited in 6 Ruling Case Law to support the text extracts therefrom quoted above.

"The validity of a police regulation must depend upon the circumstances of each case and whether the means employed are arbitrary and unreasonable beyond the necessities of the case.

Bowman v. *Va. St. Entomologist,* 128 Va. 351; 12 A. L. R. 1135.

We have already seen that vaccination statutes providing for compulsory surgical operations (for such are vaccine innoculations) have been upheld even when limited to those attending the public schools. There the health and public safety motive was predominant in support of such exercise of the police power.

The eugenical motive is judicially recognized in support of marriage laws, likewise enacted under the police power and directed against certain classes who are prohibited from marrying.

In Virginia as appears from the citations already given, marriage with the very class here involved, viz., feeble-minded inmates of state institutions, is prohibited, and its consummation visited with the very heaviest penalty of the law.

In Wisconsin a statute requiring male applicants for marriage to file a physician's certificate of freedom from disease was sustained in *Peterson* v. *Widule,* 157 Wis. 641; 147 N. W. 966; Ann. Cas. 1916B, 1040 and Note.

In *Maynard* v. *Hill*, 125 U. S. 190, 31 L. Ed. 654, this Court said:

> "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."

The validity of a statute prohibiting the marriage of epileptics was sustained in *Gould* v. *Gould*, 78 Conn. 242; 61 Atl. 604, 2 L. R. A. (N. S.) 531.

In *Kinney* v. *Conn.*, 30 Grat. 858, 32 Am. Rep.. the Court said:

> "The right to regulate the institution of marriage; to classify the parties and persons who may lawfully marry; to dissolve the relation by divorce; and to impose such restraints upon the relation as the laws of God and the law of propriety, morality and social order demand, has been exercised by all civilized governments in all ages of the world.

The purpose of the Act under review is reflected in the recitals of the preamble thereto (this preamble appearing in Acts of Assembly 1924, at page 569, but not carried into Michie's Code). Among those recitals is this:

> "Whereas, the Commonwealth has in custodial care and is supporting in various state institutions many defective persons who if now discharged or paroled would likely become by the propagation of their kind a menace to society but who if incapable of procreating might properly and safely be discharged and paroled and become self-supporting with benefit both to themselves and to society."

Here as also in the body of the act where is required a finding that the welfare of the patient will be promoted before there can be an order for sterilization, is made plain an essential object of the enactment and though society may also be benefited

both eugenically and otherwise from the act, the fact that the act is designed especially for those in confinement who under the act may be restored to a larger freedom makes clear a reasonable basis of difference in dealing with those so confined and constitutes a reasonable classification clearly within the power of the Legislature which is charged with the duty and responsibility of regulating the living conditions of those thus in the custody of the state.

The New Jersey Case.

The case of *Smith* v. *Board, etc.*, 88 Atl. 963, 32 Ann. Cas. 515, appears to be largely relied on for plaintiff in error.

Of that case it may first perhaps be fairly said, with due deference to the distinguished jurist who wrote the opinion, that the legislative purpose of the "betterment of society by means of the surgical sterilization of certain of its unoffending but undesirable members" was approached by the Court with an adverse mind, and the opinion bears internal evidences that this attitude colored the disposition of the legal questions involved in what was said of the policy and expediency of the law which it is submitted were matters for legislative rather than judicial determination.

Further it does not appear from the available report of that case that the New Jersey act had any other motive than the eugenical and was not based upon the purpose to promote the welfare of the patient as is the Virginia statute.

Again there was not present in that case, as there is here, the question of determining for one under the disabilities of both infancy and congenital defect of mind what was best for her, and there appears here also the express purpose to clear the way for a larger freedom, consideration of which was waived aside in that case.

On the whole, the provisions of the Virginia statute are so much more comprehensive in safeguarding the rights and in-

terests of the patient than was the New Jersey act that a decision upon that act rendered in apparent revulsion against its whole purpose as an innovation without merit and lacking sound humanitarian foundations, should not serve to block the path of progress in the light of scientific advance toward a better day both for the afflicted and for society whose wards they are.

The Policy and Expediency of the Act Is for Legislative Determination.

With the policy, expediency and wisdom of the act the courts have nothing to do. Those considerations are for determination exclusively by the Legislature. Such questions as whether it is better that feeble-minded women be kept in custodial care of institutions or after sterilization be given such freedom as may then be best for them and for society are legislative and not judicial questions.

The question before the Court is one of power only. If it be found that the Legislature has the power to do what it has here done without running counter to clear constitutional prohibitions, the Court may only so declare and there the function of the Court ends.

We are not permitted to approach a legislative enactment with an adverse mind as to its constitutionality.

The mere enactment of a law is a legislative declaration of the necessary constitutional power, which is entitled to great respect from a coördinate department of the government; every act is presumed to be constitutional until the contrary is made plainly to appear, and all doubts on the subject are to be solved in favor of its validity. Judicial opinions of expediency cannot be substituted for the will of the legislature when constitutionally expressed. *Pine* v. *Commonwealth*, 121 Va. 812.

A large discretion is vested in the legislature to determine what the interests of the public require and also as to what is

necessary for the protection of such interests, and every possible presumption is to be indulged in favor of the validity of a statute. *Bowman* v. *Va. Etate Entomologist,* 128 Va. 351.

CONCLUSION.

Upon the whole case it is submitted that the Virginia Sterilization Act is not obnoxious to the constitutional objections urged against it and that it affords due process of law, does not impose a cruel and unusual punishment and does not deny to plaintiff in error the equal protection of the laws, and that therefore the judgment appealed from should be here affirmed.

Respectfully,

AUBREY E. STRODE,
Attorney for the Defendant in Error.

STRODE AND EDMUNDS,
Of Counsel.
Lynchburg, Virginia,
March 15, 1927.